(5)

No. 96-795

In The

Supreme Court of the United States

October Term, 1996

ALLENTOWN MACK SALES AND SERVICE, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF OF PETITIONER

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ARGUMENT

I. THE NLRB'S POLLING STANDARD IS NOT ENTITLED TO DEFERENCE.

In its opposition to Allentown Mack's Petition, the United States argues first that review is not warranted because the Board's polling standard is entitled to deference as a rational interpretation of the Act. (Opp. Cert. 8, 9.) The United States further argues that the standard is long-standing, *Montgomery Ward & Co.*, 210 N.L.R.B. 717 (1974), and was recently reexamined and reaffirmed by the Board in *Texas Petrochemicals Corp.*, 296 N.L.R.B. 1057 (1989), *enf'd in part*, 923 F.2d 398 (5th Cir. 1991).

In fact, the Board's standard is both illogical and substantially discredited. As the Board itself acknowledges, it is better for employers to act on the basis of secret ballot polls (Board or employer-sponsored) than to act unilaterally based on information received from employees.[1] Yet the Board makes it impossible for an employer to conduct a poll (or petition for an election) unless the employer already has sufficient evidence to permit it to withdraw recognition.

Moreover, the Board's standard is inconsistent. The Board permits polling when there is no incumbent union. *Struksnes Construction Co.*, 165 N.L.R.B. 1062 (1967). Clearly, the Board finds nothing wrong with polling, *per*

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[1] As the Lodging of the United States demonstrates, the NLRB General Counsel has impliedly conceded in another forum that the Board's present rule is wrong. (*Chelsea Industries, Inc.*, 7-CA-36846, 7-CA-37106, Lodging at 8-13.)

se. It restricts polling only when a union might be harmed by the results.

The Board's standard is substantially discredited. It is unenforceable in three circuits, the Fifth, Sixth and Ninth.[2] The lone circuit to defer to the Board with respect to this standard – the D.C. Circuit in this case – was itself divided. Additionally, the standard has been questioned by two Supreme Court justices in dictum. *NLRB v. Curtin Matheson Scientific Inc.*, 494 U.S. 775 (1990) (C.J. Rehnquist, concurring and J. Blackmun, dissenting).

II. THIS CASE PROVIDES AN APPROPRIATE VEHICLE FOR THE COURT TO RESOLVE THE CIRCUIT SPLIT ON THIS IMPORTANT QUESTION OF FEDERAL LABOR LAW.

The United States argues that "further review is not warranted in this case, for petitioner's poll was unlawful even under the less stringent polling standard adopted by the courts that have rejected the Board's rule." (Opp. Cert. 12.) The United States' argument should be rejected for two reasons:

First, Allentown Mack's evidence has never been considered under the more lenient standard adopted by three circuits. The D.C. Circuit panel majority affirmed

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[2] The Fifth Circuit refused to defer to the Board's reexamined polling standard. *Texas Petrochemicals v. NLRB*, 923 F.2d 298, 402 (5th Cir. 1991). Instead the court adhered to its own precedent. *NLRB v. A.W. Thomas, Inc.*, 651 F.2d 1141 (5th Cir. 1981).

the Board's findings of fact based on the Board's standard. (App. 9.) It made no pretense of an alternative finding based on the less stringent standard applied by other circuits. If the panel majority would have found the poll unlawful under either standard, then it need not have ruled on whether the Board's polling standard was correct (and, in doing so, created a split in the circuits). *See Hajoca Corp. v. NLRB*, 872 F.2d 1169, 1175 n.1 (3d Cir. 1989) (holding that there was no need to choose between the Board's and the court's standards because the employer's action was unlawful under either).

Nor did the Administrative Law Judge consider the evidence under that standard. The ALJ only observed, in a footnote, "I likewise doubt that it [the evidence] would satisfy the somewhat lesser standard utilized as a prerequisite for a lawful employee poll by three Federal Circuit courts that have rejected the Board's standard." (App. 53, n. 7.) The ALJ, however, made no effort to apply that standard. Instead, he wrote, "As this standard is not the standard used by the Board, and as I am bound to follow Board law, the evidence will not be further discussed in relation to the courts' standard." (*Id.*)

While the Board, also in a footnote, attempted to elevate the ALJ's acknowledged refusal to apply the courts' standard into an alternative finding, the Board treated the head count, rather than the totality of the evidence, as determinative. (*Id.* at 26, n. 9.) Moreover, it refused to count statements that, under any plausible standard for determining good faith doubt, should have been counted as giving rise to such doubt. For example, the board found that Dennis Marsh's statement that he was not being represented for the $35 per month in union

dues he was paying "seems more an expression of a desire for better representation than one for no representation at all." (*Id.* at 50-51.)

Second unlike the current Board standard for employer polling, the standard applied by the Fifth, Sixth and Ninth Circuits does not boil down to a head-count, in which an employee is grudgingly counted only if there is no excuse to question or discredit the reliability of the employee's statement. Nor does it define any particular level of loss of support as "substantial." *See, eg., Texas Petrochemicals v. NLRB*, 923 F.2d 398, 402 (5th Cir. 1991). Rather, "the cumulative effect of all of the evidence must be considered." *Thomas Indus. v. NLRB*, 687 F.2d 863, 868 (6th Cir. 1982).

In this case, only Judge Sentelle, in his dissent, considered the cumulative effect of all of the evidence in light of the other courts of appeals' standard. As he found, the new company's bargaining unit contained only 32 of the 45 employees previously employed by Mack Truck. Seven of them made statements that even the Board counted as opposition to the Union. In addition to these seven, there were the following:

One employee (Marsh) said he was not being represented for the $35 he was paying in monthly union dues. The Board, contrary to common sense, found that this "seems more an expression of a desire for better representation than one for no representation at all." (App. 51.)

One employee (Ridgick) was discounted because he stated his opposition to the Union in a job interview (*Id.*

at 48), even though other statements made in job interviews were counted. (See discussion of McKilvie, Solt, Frank, Murphy, Bloch, and Baker (*Id.* at 50-52).)

One employee (Wehr) was not counted because he quit on June 23, 1991, two days before the Company sent its January 25, 1991 letter to the Union. The employee who apparently replaced him (Zoltack) said the Union was a waste of $35 (the amount of dues). He was not counted because he was hired after January 25, 1991, even though he was employed at the time of the poll. (*Id.* at 49, 51.)

An employee on the night shift (Bloch) stated that the entire night shift (five or six employees) did not want the Union. (*Id.* at 51.)

Most importantly, Mohr, the shop steward in the service department, the larger of the two departments in the bargaining unit, and a member of the Union's bargaining committee, told the Company, "with a new company, if a vote was taken, the Union would lose and it was his feeling that the employees did not want a union." (*Id.* at 53.)

Whether or not the foregoing evidence constitutes conclusive proof that the Union had lost majority support is not the question. The question, under the standard developed by three courts of appeals, is whether the evidence was sufficient to permit further inquiry, in the form of a non-coercive, secret-ballot, preannounced, poll. That issue was not addressed by the ALJ, Board or Court of Appeals in this case. If the other circuits' standard were applied, it would be difficult to reach any conclusion other than that the evidence did generate a reasonable doubt, sufficient to warrant a poll.

III. CERTIORARI SHOULD NOT BE DENIED BASED ON THE *CHELSEA INDUSTRIES* CASE PENDING BEFORE THE BOARD.

The United States concludes with the argument that certiorari should be denied because the issue presented would become moot if the Board alters its rules concerning withdrawal of recognition and Board-conducted elections, in the manner suggested by the Board's General Counsel in a pending case. *Chelsea Industries, Inc.*, 7-CA-36846, 7-CA-37106. The United States has lodged with the Supreme Court the General Counsel's Brief, filed October 23, 1995. This highly speculative argument should be rejected for several reasons.

First, it is wrong to argue that *certiorari* is improper when a litigant – what the General Counsel is in *Chelsea* – in an unrelated case has asked an agency to change a rule. To accept this argument would be to permit the United States, on behalf of the Board, to evade Supreme Court review simply by citing a litigant's argument urging the Board to reconsider a controversial rule. (In this case some 15 months have passed since the General Counsel filed his brief in *Chelsea*, and it goes without saying that the Board might well never adopt the rule.) It also would be improper to permit the United States, on behalf of the Board, to advocate a position that is contrary to one that the Board adopted elsewhere (i.e. arguing in this forum that the NLRB's rule is a rational interpretation of the Act and arguing to the Board in another context that this rule should be changed). At minimum, the General Counsel should not be allowed to evade *certiorari* merely because he has advocated contradictory positions.

Second, the General Counsel's recommendation in *Chelsea* that the Board overrule the *Celanese* good-faith doubt standard has been repeatedly advocated and rejected. In *NLRB v. Curtin Matheson, supra*, the AFL-CIO filed a brief *amicus curiae* on behalf of the Board in which it urged the Court to reject the "good faith doubt" standard. *See Brief Amicus Curiae of the AFL-CIO Supporting Petitioner in NLRB v. Curtin Matheson Scientific, Inc.*, at 1 ("we argue that this Court's recent decisions and their rationale show that the *Celanese* rule simply cannot bear scrutiny") (on file with the Court). The Court did not follow the AFL-CIO's recommendation. More pertinent to the United States' argument in this case, in *Auciello Iron Works, Inc. v. NLRB*, ___ U.S. ___, 116 S.Ct. 1754 (1996), the AFL-CIO opposed certiorari on the grounds that its recommendation that *Celanese* be overruled was then pending in a case before the NLRB. *See Transcript of Oral Argument in Auciello Iron Works v. NLRB*, 1996 WL 204131 at *8-9 (April 22, 1996) ("the AFL-CIO takes the position that the pendency of *Lee Lumber* renders the grant of cert improvident.") This Court nonetheless granted *certiorari*.

In fact, in the case to which the AFL-CIO referred in its *Auciello* brief (*Lee Lumber and Building Material Corp.*, 322 N.L.R.B. No. 14, 153 L.R.R.M. (BNA) 1159 (1996)), the NLRB declined to accept the suggestion of both the NLRB General Counsel and *amicus* AFL-CIO that the Board use the case as a vehicle to overrule *Celanese*, 153 L.R.R.M. at 1161 n.14. There is no reason to believe that the Board will take a different position on the General Counsel's recommendation in *Chelsea*. In any event, review should not be denied on the strength of what appears to be not

much more than a trial balloon floated by the Board's General Counsel.[3]

Finally, the issue in *Chelsea* is whether an employer can unilaterally withdraw recognition at the end of the certification year, based on a petition containing the signatures of a majority of workers. There was no poll. The Union's claim for bargaining rights at Allentown Mack, by contrast, was based solely on the rebuttable presumption of continuing majority support after an asset sale. When the employees had the opportunity to participate in an election (the poll conducted by the clergyman) they rejected union representation.

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[3] It is also noteworthy that when the Board was reconsidering its rules with respect to bargaining orders in *Lee Lumber* and another case, *Caterair Int'l*, 322 N.L.R.B. No. 11, 153 L.R.R.M. (BNA) 1153 (1996), it held oral argument and invited public comment. No oral argument has been held, or public input sought, in *Chelsea*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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